Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

PETER DiBIAGIO and LAURA DiBIAGIO,
EDMUND T. KARAM and BARBARA KARAM,

Petitioners,

v.

STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBERT SHINN, Commissioner of the Department of Environmental Protection,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where the State of New Jersey sold tide-flowed land in fee simple, and the deed conveyed the "right and privilege" to build a pier but prohibited all other uses of the land, and the State subsequently denies the landowner a permit to build a pier based upon regulations designed to protect shellfish habitat:

1. Does the permit denial effectively prohibit all reasonable use of the land and thus constitute a compensable taking under the Fifth Amendment?

2. May the State escape liability for a compensable taking merely because the landowner also owns and resides on the adjacent upland lot, which was not part of the conveyance from the State and to which the shellfish habitat regulations are inapplicable?

LIST OF PARTIES

Peter DiBiagio and Laura DiBiagio, husband and wife, are individual citizens and residents of New Jersey.

Edmund T. Karam and Barbara Karam, husband and wife, are individual citizens and residents of New Jersey.

The New Jersey Department of Environmental Protection is a cabinet level department in the executive branch of the State of New Jersey.

Robert Shinn is the Commissioner of the New Jersey Department of Environmental Protection.

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Peter and Laura DiBiagio and Edmund and Barbara Karam respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The opinion of the New Jersey Supreme Court was filed on February 24, 1999, and is reported at 157 N.J. 187, 723 A.2d 943 (1999). App. 1a. The opinion of the New Jersey Superior Court, Appellate Division, is reported at 308 N.J. Super. 225, 705 A.2d 1221 (N.J. App. Div. 1998). App. 3a. The relevant prior orders of the New Jersey Superior Court, Law Division are unreported but are included at App. 22a-27a. The decision of the Commissioner of the New Jersey Department of Environmental Protection (NJDEP) affirming the decision of the Administrative Law Judge is included at App. 28a. The opinion of the New Jersey Office of Administrative Law affirming the denial of a waterfront development permit is included at App. 30a. The denial by NJDEP of a waterfront development permit is included at App. 65a.

STATEMENT OF JURISDICTION

The New Jersey Supreme Court filed its opinion on February 24, 1999. This case involves claims for a regulatory taking of property without payment of just compensation in violation of the Fifth Amendment to the United States Constitution. Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

> Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey State Constitution, Article 1, ¶ 20:

> Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.

Pertinent portions of the applicable state regulations are at App. 72a-73a.

STATEMENT OF THE CASE

This case involves a parcel of submerged, tide-flowed land ("Riparian Parcel") located within the Manasquan River in Brielle, Monmouth County, New Jersey. The Riparian Parcel is approximately 118 feet wide along the shoreline, extends into the river 230 to 290 feet from the shore, and comprises 30,680 square feet. It is undeveloped. The lot is designated on the Brielle tax map as Block 99.03, Lot 5.01.

Title to the Riparian Parcel extends from a riparian grant conveyed in 1924 by the State of New Jersey to Charles and May Schweinert. The Schweinerts applied to the New Jersey Board of Commerce and Navigation for a grant in fee simple of the land beneath the Manasquan River lying adjacent to their upland property along the banks of the river. For consideration of $5,301, the Board conveyed to the Schweinerts and their heirs and assigns approximately 523,681 square feet of submerged land.

When the State conveyed the tidal land to the Schweinerts, it included a covenant which limited the use which could be made of the land. Under the terms of the deed, the State conveyed the submerged land to the Schweinerts with the "right and privilege" to fill the land (i.e., "to exclude the tidewater from so much of the lands . . . as are under tidewater, by filling in or otherwise improving the same, and to appropriate the lands . . . to their exclusive private uses"), and to construct piers. In fact, the deed quite specifically provides that beyond the limit of fill, or "bulkhead line," the land "is not to be used for any purposes whatsoever except erection of a pier or piers thereon, underneath which the tide may ebb and flow, and no solid filling shall be placed thereon."

Thus, the State conveyed to the Schweinerts a fee simple estate in the tidal land subject to a restriction in perpetuity that the *only* use permitted beyond the bulkhead line is "the erection of a pier or piers thereon, underneath which the tide may ebb and flow." Over the years, the Schweinerts subdivided their upland property and their tidal land and sold off the various subdivided portions. Homes were constructed on the upland lots, and piers were built on many of the riparian lots.

In January 1993, Petitioners Edmund and Barbara Karam purchased the Riparian Parcel, along with an adjacent upland riverfront lot (Block 99.03, Lot 5) which contains a single family dwelling. The Riparian Parcel is undeveloped — it has never been filled, nor was a pier constructed. Because they are boating enthusiasts, the Karams applied to the New Jersey Department of Environmental Protection (NJDEP) in February 1993 for a waterfront development permit to construct a pier. The Karams reasonably expected that a permit for a dock or pier would be issued by NJDEP for several reasons: (1) the riparian grant from the State to their predecessors in title, the Schweinerts, expressly conveyed the exclusive right to construct a "pier or piers"; (2) numerous piers and docks had already been approved and constructed by the Karam's neighbors along the Manasquan River, including a pier permitted by NJDEP and constructed immediately next door in 1987; and (3) the applicable regulatory scheme did not prohibit construction of a pier on the Riparian Parcel.

Mr. Karam submitted two different plans for the pier to NJDEP, one proposing the pier on the eastern side of the Riparian Parcel, and one on the western side. After reviewing the application, on May 11, 1993, NJDEP denied

the Karams a waterfront development permit pursuant to N.J.A.C. 7:7E-3.2(d), which prohibits the construction of docks and piers in "shellfish habitat."

The Karams appealed NJDEP's waterfront development permit denial, and the case was referred to the New Jersey Office of Administrative Law in September 1993. A trial was conducted in December 1994, at which expert testimony was presented by both sides on the issue of whether hardshell clam habitat actually exists within the Riparian Parcel. In April 1995, the Administrative Law Judge (ALJ) found that clam habitat exists on the site. As a result, the ALJ concluded that construction of the proposed pier is prohibited by N.J.A.C. 7:7E-3.2(d) because of the presence of shellfish habitat. The Commissioner of NJDEP issued a Final Decision in June 1995 affirming the decision of the ALJ.

Following the NJDEP Commissioner's final decision (which exhausted Petitioners' administrative remedies), the Karams filed a Complaint in the Superior Court of New Jersey, Law Division, seeking compensation for the regulatory taking of the Riparian Parcel under the Fifth Amendment to the United States Constitution and Article One of the New Jersey Constitution. As a result of NJDEP's denial of a waterfront development permit and the deed restrictions imposed by the State in the riparian grant, the Karams were unable to make any beneficial use of the Riparian Parcel. The effect of the permit denial was to compel the Karams to leave the Riparian Parcel entirely in its natural state. Thus, this lawsuit presented the trial court with a seemingly clear-cut case of a categorical taking of private property as defined in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L.

Ed. 2d 798 (1992), because the government's permit denial effectively deprived the owners of *all* economically beneficial use of their land.

While the litigation was pending, the Karams (their expectations of constructing a pier on the Riparian Parcel having been destroyed) decided to sell the Riparian Parcel, as well as the adjacent upland lot containing the home, to Petitioners Peter and Laura DiBiagio. The DiBiagios purchased the two parcels from the Karams in June 1996. The sales contract acknowledged the ongoing litigation. Under the contract, the Karams may recover the amount they expended for this litigation, while the DiBiagios are entitled to continue the litigation and recover the balance of any award of damages in this case.

On August 23, 1996, the trial court granted the Karams' motion for partial summary judgment, holding that NJDEP's denial of the development permit constituted a regulatory taking of the Riparian Parcel for which compensation must be paid. NJDEP's motion for reconsideration of this decision was denied.

NJDEP appealed the judgment to the New Jersey Superior Court, Appellate Division. The appellate court agreed with the trial judge's determination that all economically beneficial use of the Riparian Parcel had been taken as a result of NJDEP's denial of the permit. *Karam v. Department of Environmental Protection*, 308 N.J. Super. 225, 236, 705 A.2d 1221, 1226-27 (N.J. App. Div. 1998). The Appellate Division concluded that:

> the consequent denial of a development permit clearly destroys the only beneficial use of

> plaintiffs' riparian land. The terms of the riparian grant are clear — "[the] land . . . is not to be used for any purpose whatsoever except the erection of a pier. . . ." The effect of the regulatory scheme, therefore, is to sacrifice all economically beneficial uses in the riparian grant in the name of the common good.

Karam, 308 N.J. Super. at 236, 705 A.2d at 1227. In addition, the court acknowledged that the State was not excused from its constitutional obligation to pay compensation based on the State's police power to regulate under the common law of nuisance, noting that: "the DEP does not claim that the proposed use of the riparian land, erection of a dock, constitutes a common law nuisance that may be proscribed by the State." 308 N.J. Super. at 235, 705 A.2d at 1226.

Thus, the primary focus of the Appellate Division's decision was on the "denominator issue," or the extent of the plaintiffs' land against which a taking shall be measured.[1] The New Jersey court acknowledged that if the

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1. As this Court explained in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987):

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'

Id. at 497, 107 S. Ct. at 1247-48.

denominator is the Riparian Parcel alone, a compensable taking would necessarily result:

> Were we to consider the riparian grant alone as the property interest against which the loss of value is to be measured, we would be obliged to sustain Plaintiffs' claim of inverse condemnation because the effect of the regulation is to compel the property owners to leave the tide-flowed land entirely idle.

308 N.J. Super. at 236-37, 705 A.2d at 1227.

On the other hand, the court indicated that no compensable taking would be found if the denominator consisted of the Riparian Parcel plus the upland lot containing the home, presumably because the home is a reasonable use:

> Conversely, were we to consider the upland and riparian parcels as a single unit of property against which the loss of value is to be measured, we would be required to reject Plaintiffs' claim of inverse condemnation because the effect of the regulation is merely to destroy a somewhat minor "strand" or "stick" in Plaintiffs' overall bundle of rights.

Karam, 308 N.J. Super. at 237, 705 A.2d at 1227.

The Appellate Division concluded that the Riparian Parcel and the adjacent upland homesite must be treated as a "single property unit" for purposes of its takings analysis. The court believed that the following factors supported its

decision: (1) the Schweinerts were the owners of the riverfront upland when they originally purchased the tide-flowed land, and the grant would have been void if the Schweinerts were not the owners of the adjacent upland at the time of conveyance in 1924; (2) erection of a pier on the Riparian Parcel would be a "mere incident to the use of the upland property"; (3) the Riparian Parcel and the upland parcel were always bought and sold together; and (4) Petitioners received one tax bill for both parcels. Without explaining how these observations are in any way relevant to takings analysis, the court held that no compensable taking had occurred.

The appellate court failed to consider that the *State itself* had originally created and defined a unique property interest by conveying the Riparian Parcel, prohibiting any prospective use other than the construction of a pier, and then denying a permit for a pier. The court also failed to acknowledge that the upland homesite was not part of the conveyance from the State; indeed, the State has never owned that land. Finally, the court ignored the essential difference in character (as well as the consequent development expectations) between the Riparian Parcel (which is completely under water) and the upland lot (which is a developable lot containing a home). The State's waterfront development permit jurisdiction extends only to the Riparian Parcel, and not to the upland lot.

Petitioners appealed the Appellate Division's final judgment to the New Jersey Supreme Court. On February 24, 1999, the New Jersey Supreme Court (per curiam) affirmed the appellate court judgment "substantially for the reasons expressed" by the Appellate Division. 157 N.J. 187, 188, 723 A.2d 943 (1999). On March 19, 1999, Petitioners filed an untimely motion for reconsideration, *nunc pro tunc*, by the New Jersey Supreme Court. No ruling has been issued on the motion for reconsideration as of this time.

REASONS FOR GRANTING THE WRIT

The New Jersey Supreme Court's judgment turned on its analysis of one of the most unsettled issues in regulatory taking cases — the denominator question. This Court acknowledged the importance of that issue over ten years ago in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S. Ct. 1232, 1248, 94 L. Ed. 2d 472 (1987) ("one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction'"). Although the Court has alluded to the importance of the denominator question several times over the past twenty years,[2] the Court has yet to provide specific guidance on this question which is central to takings law. Filling this gap in the Court's Fifth Amendment Takings Clause jurisprudence is much needed, and the factual circumstances of this case provide an excellent opportunity for the Court to rule on the denominator question.

In the absence of an authoritative pronouncement from this Court, state and federal courts of appeal have articulated and applied a variety of conflicting standards or tests when confronted with the denominator issue. Indeed, the Appellate Division below complained that past judicial precedents consist of "a welter of seemingly irreconcilable opinions." *Karam*, 308 N.J. Super. at 232, 705 A.2d at 1225. As a result, the court observed that in "resolving the issue before us, we tread upon uncertain and constantly shifting terrain." *Id.* Courts have never agreed on the appropriate

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2. *See, e.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130, 98 S. Ct. 2646, 2662, 57 L. Ed. 2d 631 (1978); *id.* at 149 n.13, 98 S. Ct. at 2672 n.13 (Rehnquist, C.J. dissenting).

method of resolving the denominator question and prior cases offer little guidance for subsequent decisionmakers. The current state of confusion and conflict, which subjects Fifth Amendment rights to the vagaries of forum and geography, can only be resolved by an authoritative pronouncement from this Court.

I.

THE NEW JERSEY SUPREME COURT'S JUDGMENT IN THIS CASE DECIDES A FUNDAMENTAL ISSUE FOR REGULATORY TAKINGS JURISPRUDENCE THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

The denominator question is undoubtedly a fundamental issue for regulatory takings claims under the Fifth Amendment. This Court has repeatedly noted its importance. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), the Court briefly analyzed the issue, and the "inconsistent pronouncements by the Court" on the question:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as

> one in which the owner has suffered a mere diminution in value of the tract as a whole. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.

Lucas, 505 U.S. at 1016 n.7, 112 S. Ct. at 2894 n.7 (citations omitted). It was unnecessary for the Court to address the denominator question in the *Lucas* case, however, because the regulations left each of the claimant's two beachfront lots without economic value.

The critical nature of the issue has been recognized by the Court since the watershed case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 419, 43 S. Ct. 158, 161, 67 L. Ed. 322 (1922) (Brandeis, J. dissenting) ("But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land."). *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130, 98 S. Ct. 2646, 2662, 57 L. Ed. 2d 631 (1978) ("In deciding whether a particular governmental action has effected a taking, this Court focuses on the . . . extent of the interference with rights in the parcel as a whole"); *cf. Penn Central*, 438 U.S. at 149 n.13, 98 S. Ct. at 2672 n.13 (Rehnquist, C.J., dissenting) ("but the Court must define the particular property unit that should be examined"); *see also Keystone Bituminous Coal Ass'n*, 480 U.S. at 514-15, 107 S. Ct. at 1257 (Rehnquist, C.J. dissenting) ("The need to consider the effect of regulation on some identifiable segment of property makes all important the admittedly difficult task of defining the relevant parcel."). Yet, despite having recognized the fundamental importance of the

denominator question to the protection of Fifth Amendment rights decades ago, the Court has still not formulated an answer to this difficult question.

The circumstances of Petitioners' case will provide the Court with an extraordinary vehicle through which the Court can articulate a standard, or perhaps a rule, for use in the difficult task of defining the relevant parcel. Several aspects of this case make it particularly appropriate.

First, the denominator issue was dispositive of Petitioners' Fifth Amendment claims. The opinion of the Appellate Division adopted by the New Jersey Supreme Court recognized that, like the situation in *Lucas*, this case involves a categorical taking in which *all* economically beneficial use of the Riparian Parcel was prohibited by State regulation. Moreover, the appellate court realized that the outcome of the case depended entirely on the definition of the relevant parcel for takings purposes. The court conceded that if its analysis were limited to the Riparian Parcel alone, a compensable taking would result, whereas if the upland homesite was added to the equation, no taking would be found, presumably because the dwelling provided reasonable use.

Second, the factual circumstances of this case present a multiplicity of factors relevant to the analysis, some of which have been touched on by this Court in its brief discussions of the denominator question. In *Lucas*, the Court said that the answer:

> may lie in how the owner's reasonable expectations have been shaped by the State's law of property — i.e., whether and to what degree

> the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.

Lucas, 505 U.S. at 1016 n.7, 112 S. Ct. at 2894 n.7.[3]

Tidal lands have been given distinctive recognition and treatment by the common law and New Jersey statutory law for hundreds of years because of their special character and importance to commerce, *see City of Hoboken v. Pennsylvania R. Co.*, 124 U.S. 656, 690, 8 S. Ct. 643, 654, 31 L. Ed. 543 (1888). Thus, Petitioners' interest in the Riparian Parcel has an especially rich background of protection under state property law. *Cf. Kaiser Aetna v.*

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3. *See Phillips v. Washington Legal Foundation*, __ U.S. __, 118 S. Ct. 1925, 1930-32, 141 L. Ed. 2d 174 (1998) (Court looked to "traditional property interests" and "background principles of property law" when determining whether interest earned on IOLTA account was private property of client for purposes of taking analysis); *Keystone Bituminous Coal Ass'n*, 480 U.S. at 518-19, 107 S. Ct. at 1259-60 (Rehnquist, C.J. dissenting) ("we have evaluated takings claims by the units of property defined by state law"); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972) (property interests are not created by the Constitution; rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"). *See also Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, __, 117 S. Ct. 1659, 1672, 137 L. Ed. 2d 980 (1997) (Scalia, J. concurring in part and concurring in judgment) (distinguishing analysis of *Penn Central* case and stating that the "relevant land, it could be said, was the aggregation of the owners' parcels subject to the regulation (or at least the contiguous parcels)").

United States, 444 U.S. 164, 166-67, 100 S. Ct. 383, 386, 62 L. Ed. 2d 332 (1979) (describing recognition of distinct interest in Hawaiian fishponds by traditional state property law and treating claimants' marina, but *not* the adjacent upland development, as relevant property unit for purposes of takings claim analysis).

Of particular significance here is the fact that the State of New Jersey itself created the property interest at issue, and shaped the landowner's expectations, by conveying a fee simple interest in submerged land with a covenant specifying that it could be used for only one purpose —construction of a pier — and nothing else. Subsequently, of course, it was the same State which prohibited construction of a pier, effectively prohibiting all productive use of the Riparian Parcel. While the circumstances of this case present many relevant factors, the basic factual picture remains clear and uncluttered. As a result, the Court's analytical task will be facilitated by the particularly appropriate qualities of Petitioners' case.

Finally, the state government's actions in this case are especially striking — what the State sold in 1924 it now has completely reclaimed without paying any compensation. The State agency responsible for riparian grants, and for issuing waterfront development permits, conveyed the subject tidal lands to Petitioners' predecessors in title for substantial monetary consideration. Almost seventy years later, the State took back the Riparian Parcel as shellfish habitat by requiring that the land be left in its natural state. Yet, the State has avoided paying just compensation by persuading the New Jersey Supreme Court to simply expand the relevant unit of property for takings analysis to include the adjacent upland lot containing the home, even though that parcel was not part of the initial State conveyance, and is not subject to the shellfish habitat regulations.

The Court has long recognized the critical importance of the denominator question. Now is the time for the Court to take the opportunity offered by this case to provide consistency, clarity and authority to the application of the Takings Clause of the Fifth Amendment, which, as the Chief Justice recently emphasized is "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment." *Dolan v. City of Tigard*, 512 U.S. 374, 392, 114 S. Ct. 2309, 2320, 129 L. Ed. 2d 304 (1994).

II.

THERE EXISTS A CONFLICT AMONG STATE SUPREME COURTS AND STATE AND FEDERAL APPELLATE COURTS OVER THE APPROACH TO THE DENOMINATOR QUESTION

Various conflicting approaches to the denominator question have been developed and applied by appellate courts at the state and federal level. No single approach has gained currency, however, because there has been no authoritative ruling from this Court. The confusion has reached the point where even a thorough review of applicable precedents will not enable landowners or government regulators to make reasonable predictions as to the outcome of regulatory takings claims.

Several state appellate courts which have recently confronted the denominator question have undertaken an exhaustive review of the relevant caselaw only to conclude that there is little guidance to be drawn from precedent. *See East Cape May v. Dept. of Environmental Protection*, 300 N.J. Super. 325, 353, 693 A.2d 114, 128 (N.J. App. Div. 1997) (the cases "indicate the presently unsettled state

of New Jersey and Federal law on the question of how to determine the relevant 'property' for the purpose of deciding whether police power statutes or regulations . . . have deprived the owner of substantially all viable economic use of its property"); *see also Machipongo Land & Coal Co., Inc. v. Com., Dept. of Environmental Resources*, 719 A.2d 19, 26 (Pa. Cmwlth. 1998) (the courts "have addressed the problem of deciding how the denominator is determined in a regulatory takings case, but they have never agreed on the appropriate method for determining that portion of the fraction and have provided little in the way of guidance").

The conflicting approaches employed by state and federal courts thus far include: (1) the contiguous land under common ownership approach; (2) the unity of use approach; (3) a multi-factor analysis; and (4) the property interest affected by the regulation approach.[4] Reconciling these conflicting lower court rulings is a task reserved to this Court, and this case provides a good vehicle for accomplishing the task.

Many courts considering the composition of the denominator have relied almost exclusively on the factors of contiguity and common ownership.[5] For example, in *Zealy v.*

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4. *See generally* JOHN E. FEE, *Comment, Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994) (examining inconsistent approaches taken by courts to denominator question and proposing yet another alternative for resolving the question); MARK R. LISKER, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663, 706-19 (1996) (examining various conflicting approaches taken by lower federal courts to the question).

5. *See* John E. Fee, *Comment*, 61 U. CHI. L. REV. at 1546 ("A common method of isolating a bundle of property interests for (Cont'd)

City of Waukesha, 201 Wis.2d 365, 548 N.W.2d 528 (1996), the claimant owned approximately 10.4 contiguous acres of land. A portion was zoned for business uses, a portion for residential use, and a portion was rezoned from residential use to create a conservancy district in which no development was permitted. The claimant argued that a taking had occurred as to the portion limited to conservation. In that case, where the availability of permitted uses clearly played a key role, the Wisconsin Supreme Court relied exclusively on the contiguous land under a common owner test to deny the takings claim. *Zealy*, 201 Wis.2d at 374-79, N.W.2d at 532-34.

By contrast, permitted uses were the driving force behind the Ninth Circuit's decision in *American Savings and Loan Ass'n v. Marin County*, 653 F.2d 364 (9th Cir. 1981). In examining whether two contiguous parcels under common ownership should be treated as separate for takings purposes, the Ninth Circuit framed the denominator question as: "whether the challenged ordinance creates two separate parcels for taking purposes by adopting different zoning designations for each parcel." *Id.* at 370. The regulation had isolated one of claimant's parcels into a unique zone of very low density residential use. According to the court, a "deprivation by a non-uniform ordinance of a portion of [claimant's] property which is substantial and otherwise

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(Cont'd)
regulatory takings analysis is to consider all contiguous property under a common owner as a single, indivisible parcel. This method of defining the relevant parcel, however, is more often an unstated assumption than a carefully chosen methodology. Indeed, a number of courts seem to have implicitly employed this uniformity-of-ownership definition without even evaluating the propriety of other rules.").

economically viable . . . tends to require that the zoning" of the two parcels be evaluated separately. *Id.* at 371.[6]

The Federal Circuit and Court of Claims have frequently used a multi-factor analysis when deciding the denominator question. *See, e.g., Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) ("Our precedent displays a flexible approach, designed to account for factual nuances."). Courts employing this approach have analyzed a wide variety of factors such as: "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, [and] the extent to which the protected lands enhance the value of remaining lands." *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (Cl. Ct. 1991); *see also Broadwater Farms Joint Venture v. United States*, 35 Fed. Cl. 232, 239 (Cl. Ct. 1996). Other factors employed include: the purpose of the imposition,

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6. *See also Zealy v. City of Waukesha*, 194 Wis.2d 701, 714, 534 N.W.2d 917, 922 (Ct. App. Wis. 1995), *rev'd*, 201 Wis.2d 365, 548 N.W.2d 528 (1996) (Wisconsin Court of Appeal framed the denominator question as "whether that part of the parcel unaffected by regulation is relevant to the anticipated use of the affected part of the parcel"); *Quirk v. Town of New Boston*, 140 N.H. 124, 130-31, 663 A.2d 1328, 1332-33 (1995) (holding that regulation which required buffer zone around campgrounds did not effect a taking because the two segments of the property had the same use, and noting that "focusing on a discrete portion of a larger tract may be appropriate where the land owner has fragmented the property for distinct development or uses"). *Cf. Town of Jupiter v. Alexander*, 1998 WL 634705, at *5-6 (Fla. App. 4 Dist. Sept. 16, 1998), *reh'g denied*, 1998 WL 813415 (Fla. App. 4 Dist. Nov. 12, 1998) (holding that claimant's two parcels, a mainland parcel fronting on a river and an island located 500 yards from the mainland parcel, should be considered a single tract for takings purposes because the parcels had a single unity of use).

the nature of the property, its alternative uses, and the extent to which all or only a portion of claimant's property was so limited. *See Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1172-73 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991).

While several state courts seem to have adopted the multi-factor analysis approach, *see, e.g., K & K Construction, Inc. v. Department of Natural Resources*, 456 Mich. 570, 579-83, 575 N.W.2d 531, 536-38 (1998), *cert. denied*, 119 S. Ct. 60 (1998), the Michigan Supreme Court appears to have disavowed the Federal Circuit's *Loveladies Harbor* case, even though it employed the same multi-factor approach. *See Volkema v. Department of Natural Resources*, 457 Mich. 884, 586 N.W.2d 231 (1998) (result reached by court of appeals is correct but its "analysis, particularly its reliance on *Loveladies Harbor* . . . is disavowed insofar as it is inconsistent with this Court's decision in *K & K Construction*").

Finally, courts have treated the property interest defined by the regulation as the relevant unit for takings purposes. *See, e.g., Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 40 N.J. 539, 193 A.2d 232 (1963) (treating only the portion of claimant's two contiguous parcels affected by regulation as the relevant parcel for takings purposes). Notably, the New Jersey Supreme Court's decision in the instant case directly conflicts with its earlier decision in *Morris County Land*.

In a recent case employing this approach, the owners of mineral rights challenged a Pennsylvania regulation designating certain portions of land within a watershed area as unsuitable for surface mining of coal. *Machipongo Land*,

supra, 719 A.2d at 22. The coal owners claimed a taking because they were deprived of all of their right to mine the coal. According to claimants, the relevant property unit for takings purposes was only the affected coal because Pennsylvania law has traditionally recognized coal as a separate estate in land. *Id.* at 23.[7] The court decided that, of three different approaches it had discerned in prior caselaw, a property-interest-affected-by-regulation approach was best to determine the denominator. The court concluded that only the regulated land, i.e., the separate estate in coal, would be considered in determining the denominator. *Id.* at 28.

Faced with this welter of conflicting precedent, neither landowner nor regulator (nor the courts for that matter) can adequately predict the outcome of a regulatory taking dispute. Yet, predictability is an essential attribute of the rule of law. According to Justice Holmes' well-known apothegm: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." OLIVER W. HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 173 (1920). Nothing short of a ruling by this Court can restore the necessary consistency, and consequent predictability, to lower court decisions applying the Fifth Amendment's Takings Clause to regulatory takings claims.

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7. The *Machipongo Land* case is remarkably similar to *Pennsylvania Coal Co., supra*, 260 U.S. 393 (1922) (Pennsylvania law restricting subsurface extraction of coal held to effect a taking of owners' separate interest in coal), and to the more recent case of *Keystone Bituminous Coal Ass'n, supra*, 480 U.S. 470 (1987) where the Court held that a nearly identical Pennsylvania law did not effect a taking. *Cf. Keystone Bituminous*, 480 U.S. at 515-20, 107 S. Ct. at 1257-60 (Rehnquist, C.J. dissenting).

The problem for lower state and federal courts is acute. Confronted by the "admittedly difficult" denominator question, lower courts can find little or no persuasive force in Takings Clause doctrine. Because there is almost no guidance to be gleaned from current precedents, the denominator question is decided anew in every forum, indeed, in every case. However, "the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do *not* require from them a fresh judgment from case to case." H.L.A. HART, THE CONCEPT OF LAW 132 (1961); *see also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) ("adherence to precedent should be the rule and not the exception . . . the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him").

An authoritative ruling from this Court on the denominator question will resolve the conflict in the lower courts over this critical question of constitutional law. This case presents the Court with an extraordinary opportunity to make such a ruling.

CONCLUSION

The petition for a writ of certiorari should be granted to provide clarity and consistency to the application of the Takings Clause of the Fifth Amendment to regulatory takings claims through an authoritative ruling on the critical question of what constitutes the relevant property unit, a question long recognized as fundamentally important, yet not previously ruled upon, by this Court. The petition should also be granted to resolve the numerous conflicts among state and federal appellate courts over the proper method for resolving the denominator question.

Respectfully submitted,

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